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No. 88-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN S. LYTLE,

Petitioner,

v.

HOUSEHOLD MANUFACTURING, INC.,
d/b/a SCHWITZER TURBOCHARGERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in applying collateral estoppel to Petitioner's § 1981 claims after a full and fair hearing was held on his Title VII claims, the elements of which are identical to those under § 1981?

2. Does the Seventh Amendment require that Petitioner receive a new jury trial on his § 1981 claims when he failed to establish a *prima facie* case of discrimination during the trial of his Title VII claims?

LIST OF PARTIES

The Respondent, Household Manufacturing, Inc., is a wholly-owned subsidiary of Household International, Inc. All other parties in this matter are set forth in the caption.

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STATEMENT OF THE FACTS

Schwitzer Turbochargers manufacturers turbochargers at its facility in Arden, North Carolina. John Lytle, the Petitioner, was employed by Schwitzer as a machinist. Like many employers, Schwitzer maintains an absentee policy which distinguishes between excused and unexcused absences.[1] Excessive *excused* absenteeism is defined as a total absence level which exceeds four percent of the total

[1] Joint Appendix at 47.

available working time, including overtime.[2] Excessive *unexcused* absenteeism is defined as unexcused absences exceeding eight hours (equivalent to one work shift) in a twelve month period. Excessive absences of either type can result in termination.[3]

On Thursday, August 11, 1983, Lytle was notified that he and four other machinists would be required to work overtime on Saturday, August 13.[4] Lytle asked his supervisor, Larry Miller, if he could take Friday, August 12, as a vacation day. Miller agreed on the condition that Lytle would work on Saturday.[5] Despite this understanding, Lytle left work 1.8 hours early on Thursday and did not report or call in on either Friday or Saturday.[6] These absences gave Lytle a total of 17.8 hours of unexcused absences, or 9.8 hours of excessive unexcused absences.[7] Pursuant to company policy, Lytle was terminated on Monday, August 15, 1983, for excessive *unexcused* absences. After his termination, Schwitzer provided prospective employers with a letter of reference which included Lytle's dates of employment and job title.[8] No mention was made of the reason for his discharge or his pending EEOC charge or lawsuit.

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[2] *Id.* at 48.

[3] *Id.* at 49.

[4] *Id.* at 140.

[5] Petitioner maintained a diary while he worked at Schwitzer. In his entry for Thursday, August 11, 1983, he admits that: "At 10:30 I asked Larry for a vacation day for Friday, August 12th. He said okay, but I would have to work Saturday the 13th." J.A. at 143.

[6] *Id.* at 141-42.

[7] Petition, App. 28a.

[8] *Id.* at 93, 177-81.

STATEMENT OF THE CASE

Lytle filed suit in the United States District Court for the Western District of North Carolina alleging that he was discharged because of his race. He further alleged that Schwitzer had retaliated against him for filing a charge with the Equal Employment Opportunity Commission by refusing to provide prospective employers with a detailed letter of reference. Relying on exactly the same factual allegations, Petitioner sued under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. The district court dismissed the § 1981 claims prior to trial, holding that in the absence of an independent factual basis to support a § 1981 claim, Title VII provides the exclusive remedy for employment discrimination. At the close of Plaintiff's evidence, the court dismissed the Title VII discriminatory discharge claim pursuant to Fed. R. Civ. P. 41(b). The court also dismissed Lytle's Title VII retaliation claim at the close of all the evidence under Rule 41(b).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the district court's determination that Petitioner failed to present a *prima facie* case on his Title VII discharge and retaliation claims. After observing that the elements of proof are identical for Title VII and § 1981, the Fourth Circuit held that the district court's factual findings on the Title VII claims collaterally estopped relitigation of the § 1981 claims. Petitioner filed a motion for rehearing and rehearing *en banc* with the court of appeals. The motion for rehearing was denied by the original panel and the motion for rehearing *en banc* was denied by the full court.

Despite a complete trial on the merits followed by a thorough review by the court of appeals of his Title VII claims, Petitioner now seeks to overturn these judgments and begin anew because he was denied a jury trial in his companion § 1981 suit. Respondent submits that the holding of the court of appeals, based on the sound teachings

of this Court, provided a correct disposition of the issues raised and issuance of a writ of certiorari is, therefore, unnecessary.

SUMMARY OF REASONS FOR DENYING THE PETITION

The decision of the court of appeals is consistent with this Court's decisions in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Katchen v. Landy*, 382 U.S. 323 (1966). Therefore, this petition presents no new or important issue warranting review by this Court. Moreover, any potential error committed by the district court in dismissing the § 1981 claims was utterly harmless, since Respondent would have received a directed verdict and the case would never have reached the jury. Accordingly, this Court need not address the collateral estoppel issue or the alleged conflict between circuits to deny this petition.

ARGUMENT

I. THE FOURTH CIRCUIT'S APPLICATION OF COLLATERAL ESTOPPEL TO PETITIONER'S § 1981 CLAIMS IS CONSISTENT WITH DECISIONS OF THIS COURT

Petitioner contends that the Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), requires reversal of the Fourth Circuit's decision. *Beacon Theatres* holds that when legal and equitable claims are joined in one proceeding, the legal claims should be tried first before a jury if possible. This doctrine, although derived from the Seventh Amendment, is nothing more than a "general prudential rule" for courts to follow. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335 (1979).[9] Like most other rules of constitutional origin, the *Beacon*

[9] In *Katchen v. Landy*, 382 U.S. 323 (1966), the Court stated that the *Beacon Theatres* rule is an equitable doctrine which is inapplicable when Congress develops a statutory scheme contemplating the prompt trial of disputed claims without the intervention of a jury.

Theatres doctrine cannot be woodenly applied and must yield when outweighed by other important principles of law.[10]

In *Parklane Hosiery*, this Court addressed a conflict between the *Beacon Theatres* rule and the principle of judicial economy underlying the doctrine of collateral estoppel. Importantly, the Court noted that the major premise of *Beacon Theatres* was that a decision of a court sitting in equity could have collateral estoppel effect in subsequent legal proceedings. *Parklane Hosiery*, 439 U.S. at 334. The Court rejected the argument that the Seventh Amendment prohibits application of collateral estoppel to preclude a jury trial of facts previously decided by an equity court and found that the Seventh Amendment does not establish such a rigid barrier to the efficient operation of our legal system. Instead, the Court adopted a more pragmatic view of the Seventh Amendment, one which guarantees the plaintiff a full and fair opportunity to litigate his claims, but prohibits needless relitigation of facts already decided. Thus, application of collateral estoppel does not violate the Seventh Amendment where "there is no further fact-finding function for the jury to perform, since the common factual issues have been decided." *Id.* at 336. Using this realistic approach, the Court held that any harm caused by the denial of a jury trial was clearly outweighed by the judicial interest in the economical resolution of cases.

In *Ritter v. Mount Saint Mary's College*, 814 F.2d 986 (4th Cir.), *cert. denied*, 108 S. Ct. 260 (1987), the Fourth Circuit applied the rationale of *Parklane Hosiery* to a case in which the district court dismissed plaintiff's Age Discrimination Act[11] and Equal Pay Act[12] claims,

[10] *Cf. Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (First Amendment rights subject to reasonable restrictions).

[11] 29 U.S.C. § 621 *et seq.*

[12] 29 U.S.C. § 206(d). Unlike Title VII, both of these statutes provide for trial by jury.

and tried the Title VII claims without a jury. After determining that the legal and equitable claims shared common elements, the court held that the factual determinations made by the district judge in dismissing the Title VII suit collaterally estopped relitigation of the legal claims. The court found this situation squarely within the Court's holding in *Parklane Hosiery*, stating:

> This court need not involve itself in the laborious and inconclusive policy analysis suggested by the parties on this issue, however, because the Supreme Court has already undertaken this policy analysis for us. *Parklane* decided that the judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in re-trying before a jury the facts of a case determined by a court sitting in equity.

Ritter, 814 F.2d at 991.

The same policy considerations support the Fourth Circuit's decision in the instant case. Petitioner received a full and fair opportunity to try his claims before the district judge. His claims were involuntarily dismissed and a new trial of the same facts is unnecessary.

Petitioner seeks to distinguish *Ritter* and the Fourth Circuit's decision in *Lytle* from *Parklane Hosiery* on the grounds that the dismissal of Plaintiff's legal claims in *Ritter* and *Lytle* was erroneous. This attempted distinction is without merit. First, the distinction advanced by Petitioner does not impact the applicability of *Parklane*. The same considerations of judicial economy apply whether or not dismissal of the legal claims was in error. Second, it is far from clear that the district court erred when it dismissed Lytle's § 1981 claims and thereby denied a trial by jury. This Court has never squarely addressed the issue of whether a plaintiff can sue under *both* Title VII and § 1981 on the same factual allega-

tions.[13] In dismissing those 1981 claims, the district court relied on a line of cases decided by the Fifth Circuit and other federal courts, which hold that a § 1981 claim can be brought concurrently with a Title VII claim only if there is an independent factual basis. *See Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n. 4 (5th Cir. 1982); *Tafoya v. Adams*, 612 F. Supp. 197 (D. Colo. 1985), *aff'd on other grounds*, 816 F.2d 555 (10th Cir.), *cert. denied*, 108 S. Ct. 152 (1987).[14] Furthermore, the applicability of § 1981 to private employment, and, if applicable, the scope of such coverage, will be at issue this term when the Court hears *Patterson v. McLean Credit Union*, No. 87-107. Until this decision is rendered, the premise of Petitioner's argument is very much in doubt.

More importantly, under *Parklane Hosiery*, the critical issue is not whether the trial court's denial of the jury trial was correct, but whether harm resulted from the denial. *Ritter*, 814 F.2d at 991.[15] As long as the district judge's factual findings are not erroneous, Petitioner was not prejudiced and the judicial interests underlying the doctrine of collateral estoppel outweigh any nominal injury.[16] Otherwise, each dismissal of a legal claim would

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[13] *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), relied on by petitioner, specifically holds only that a claimant's pursuit of administrative remedies under Title VII does not toll the statute of limitations under § 1981.

[14] The Fifth Circuit has apparently retreated from this rationale. *See Hernandez v. Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139 (5th Cir. 1988).

[15] In *Parklane Hosiery*, the Court recognized that "the presence or absence of the jury as a factfinder is basically neutral." *Parklane Hosiery*, 439 U.S. at 334 n.20.

[16] Petitioner cites *Johnson v. Mississippi*, 108 S. Ct. 1981 (1988), for the proposition that erroneous decisions cannot be relied upon for collateral estoppel purposes. This citation is, at best, misleading. In *Johnson*, the court held that a prior conviction which was subsequently overturned could not be used as an aggravating factor in deciding whether to impose the death penalty. This case did not

initiate an interlocutory appeal in which the merits of the case would be indirectly determined without the benefit of a record. Alternatively, the parties must conduct a full trial to the bench with the risk it may be for naught if any of the legal claims are reversed and remanded to be tried by a jury, at a cost of substantial time and resources to the court and to the litigants. *Id.* Fortunately, in *Parklane Hosiery* this Court balanced the interests involved and found that the scale tipped in favor of applying collateral estoppel. Where, as here, Petitioner has been provided a full and fair opportunity to litigate his claims, "one trial of common facts is enough." *Ritter*, 814 F.2d at 991.

Although petitioner places great emphasis on *Beacon Theatres* and its progeny, the holdings of *Parklane*, *Ritter*, and the instant case do not vitiate the impact of these decisions. In the vast majority of cases the federal courts will continue to follow the prudential rule of *Beacon Theatres* and decide legal claims first whenever they are joined in the same action with equitable claims. In the rare case where the equitable issues are tried first, *Parklane Hosiery* holds that the Seventh Amendment does not compel the expensive, time-consuming relitigation of factual issues already decided. The Fourth Circuit's decision in the instant case comports with this philosophy and should not be disturbed.[17]

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involve collateral estoppel or the Seventh Amendment. Instead, it was based on the cruel and unusual punishment clause of the Eighth Amendment and should be disregarded.

[17] The Court's decision in *Tull v. United States*, 107 S. Ct. 1831 (1987), is not inconsistent. In *Tull*, the Court addressed the issue of whether the right to jury trial *exists* under the Clean Water Act. The Court was not faced with a situation like the instant case where the trial court after dismissing the jury claims heard the equitable claims under a parallel equitable cause of action. Therefore, *Tull* falls under the general rule of *Beacon Theatres* rather than the exception of *Parklane Hosiery* and does not apply to the case at hand.

Petitioner contends that the Fourth Circuit's holding is in conflict with other circuits. However, most of the cases relied upon by Petitioner are inapplicable to the specific question at issue in this case. In *Wade v. Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988), the parties concurrently tried the § 1981 claim to the jury and the Title VII claim to the court. The jury entered a verdict for plaintiff on the § 1981 claim and the judge inconsistently ruled for defendant on the Title VII claim. The court applied the general rule of *Beacon Theatres* and held that the judge was bound by the factual conclusions of the jury. Since the legal and equitable claims were tried simultaneously, collateral estoppel was not at issue. Accordingly, this case is not relevant to the determination of the instant case.

Roebuck v. Drexel University, 852 F.2d 715 (3d Cir. 1988), is also inapposite. In *Roebuck*, the trial judge allowed the jury to hear the § 1981 claim, but set aside its verdict for the plaintiff. The district court also ruled in favor of the employer on the Title VII claims. The Third Circuit found sufficient evidence existed to defeat Drexel's motion for judgment *n.o.v.*, but agreed that the jury's verdict was against the clear weight of the evidence. Faced with such conflicting factual determinations, the only logical result was a new trial. The situation in *Roebuck* differs markedly from the one in the instant case, where the Fourth Circuit was not presented with a jury verdict and faced only the decision of the district judge. Unlike *Wade* and *Roebuck*, the district court here did not substitute its own view of the facts for the verdict of the jury.[18] Therefore, these cases do not help in the resolution of this case.

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[18] Similarly, the passage *from Bouchet v. National Urban League*, 730 F.2d 799 (D.C. Cir. 1984), cited by Petitioner, is *obiter dictum*. The actual holding of that case was that the trial judge *correctly* dismissed the legal claims and struck the jury trial demand.

Thus, of the circuit court decisions on which Petitioner relies, only the Seventh Circuit's decision in *Hussein v. Oshkosh Motor Co.*, 816 F.2d 348 (7th Cir. 1987), arguably conflicts with *Ritter* and the case at hand. In *Hussein*, the Seventh Circuit misinterpreted the teachings of *Parklane* and failed to respect its holding. In an equivocal decision which produced four opinions from a three-judge panel, the Seventh Circuit placed undue emphasis on the error of the judge in dismissing the jury rather than the consequent harm to plaintiff. As a result, the court ignored the balance of the competing policy concerns of collateral estoppel and the *Beacon Theatres* rule already provided by this Court in *Parklane*. The decision of the Fourth Circuit represents a more reasoned approach, one that is faithful to this Court's holding in *Parklane Hosiery*.

In any event, the presence of an apparent conflict between the Fourth and Seventh Circuits does not require issuance of a writ of certiorari. As discussed in more detail below, the denial of a jury trial did not affect the result in this case. (*See* Part II of this Brief, *infra*). While the Fourth and Seventh Circuits may disagree over the collateral estoppel issue, both are in agreement that a new trial is not warranted if the denial of the jury trial was harmless error. *Hussein*, 816 F.2d at 354 n.6. Even if a jury had been impaneled, Petitioner's evidence was insufficient to defeat a motion for directed verdict. Thus, resolution of the apparent conflict is unnecessary, since the case can be decided on other grounds. *See The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) (a conflict should only be resolved in the context of meaningful litigation); *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied when resolution of the conflict would not change the result below). For these reasons, this Petition should be denied.

II. DISMISSAL OF THE § 1981 CLAIMS HAD NO EFFECT ON THE OUTCOME OF THIS CASE

Assuming, *arguendo*, that the court of appeals erred in holding that relitigation of Petitioner's § 1981 claim was precluded by collateral estoppel, such error was harmless under Fed. R. Civ. P. 61 and does not warrant a new trial.[19] This Court has long recognized that when a plaintiff's evidence is insufficient to establish a *prima facie* case, the Seventh Amendment is not violated by the issuance of a directed verdict. *Galloway v. United States*, 319 U.S. 372 (1943). In *Galloway*, this Court pointed out that the Seventh Amendment guarantees both a plaintiff's right to have legitimate claims heard by a jury and a defendant's right to attack the legal sufficiency of plaintiff's evidence without protracted litigation. *Id.* at 392-93. The Court rejected the contention that the Seventh Amendment requires a new trial where, as here, plaintiff cannot establish a critical element of his claim. *Id.* at 394.

Other courts of appeals addressing this issue agree with the First Circuit that "There is no constitutional right to have twelve men sit idle and functionless in a jury box." *In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982). In *Laskaris v. Thornburg*, 733 F.2d 260 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984), the Third Circuit affirmed the district court's dismissal of plaintiff's § 1981 claims alleging politically motivated discharges. The court held that the dismissal of these claims, and the affiliated right to jury trial, constituted harmless error

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[19] This point was argued by Respondent before the court of appeals, but the court did not reach this issue. However, it is well established that a respondent can seek affirmance on any ground disclosed by the record. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

since the evidence adduced at trial was insufficient to avoid a directed verdict if a jury had been impaneled.[20]

The cases relied upon by Petitioner are not inconsistent. For example, in *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987), the court stated that before addressing the collateral estoppel issue, there must be an inquiry into whether the denial of the jury constitutes harmless error. *Hussein* 816 F.2d at 354 n.6. In fact, Petitioner agrees that if a directed verdict could have been granted, the denial of a jury trial is harmless error. *See* Petition, page 26 n. 11.

Here, Petitioner suffered no harm due to the absence of a jury. Federal Rule of Civil Procedure 50(a) governs motions for directed verdict. A directed verdict is appropriate when there is a complete absence of proof on an issue material to the cause of action or when there are no controverted issues of fact upon which reasonable jurors could differ. *Brady v. Southern Railroad*, 320 U.S. 476 (1943); 5A Moore's Federal Practice at ¶ 50.02. The evidence must be viewed in the light most favorable to the non-moving party. *Id.*

The evidence presented by Petitioner in this case, even when viewed in the most favorable light, is insufficient to defeat a directed verdict. As the Fourth Circuit correctly noted, "it is established beyond peradventure that the elements of a *prima facie* case of employment discrim-

[20] *Accord Bowles v. United States Army Corps of Engineers*, 841 F.2d 112 (5th Cir. 1988); *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987); *Howard v. Parisian*, 807 F.2d 1560 (11th Cir. 1987); *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986); *In re Professional Air Traffic Controllers Organization of America*, 724 F.2d 205 (D.C. Cir. 1984); *Atwood v. Pacific Maritime Association*, 657 F.2d 1055 (9th Cir. 1981); *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979); *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728 (10th Cir.), *cert. denied*, 389 U.S. 857 (1967).

ination alleging disparate treatment under Title VII and § 1981 are identical." Slip. op. at 7. Facts that preclude relief under Title VII also preclude a § 1981 claim. *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court established the elements necessary to make out a *prima facie* case of disparate treatment under both statutes. In *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985), the Fourth Circuit refined the elements applicable to suits, like this one, which allege discriminatory disciplinary action. The court held that to establish a *prima facie* case of racial discrimination in a case involving a discharge for violation of company rules or policies, the plaintiff must show: (1) that he is black; (2) that he was discharged for violation of a company rule; (3) that he engaged in prohibited conduct similar to that of a person of another race; and (4) that disciplinary measures enforced against him were more severe than those enforced against the other person. *Moore*, 754 F.2d at 1106.

Application of these factors to this case reveals that Petitioner failed to establish a *prima facie* case. Schwitzer's absentee policy distinguishes between excused and unexcused absences, with a stricter standard for the latter based on the greater disruptive effect of unexcused absences on Respondent's operation. It is undisputed that Petitioner left early on August 11, and did not report or call in August 12, or August 13, 1983, and that such conduct constitutes unexcused absences under Schwitzer's policies.[21] Petitioner was unable to identify a single, non-black employee guilty of a similar violation who was not also discharged. This inability to identify an individual guilty of a similar offense who was treated preferen-

[21] JA 51, 140-42.

tially prevented Lytle from establishing a vital element of a *prima facie* case. *Id.*

Petitioner attempted to support his claims through evidence of white employees who had excessive *excused* absences but were not terminated. However, Schwitzer's policies clearly distinguish excessive *excused* and *unexcused* absences. Therefore, these two violations are not "similar" as that term is used in *Moore*, and comparison of the two does not establish a *prima facie* case.

Significantly, after hearing *all* of Lytle's evidence, District Judge David B. Sentelle granted Schwitzer's motion for involuntary dismissal under Fed. R. Civ. P. 41(b) on the discriminatory discharge claim. In making this determination, the court recognized the difference between excused and unexcused absences under Schwitzer's attendance policy. (App. 27a). The court also found that the *excused* absences of white employees were not as serious as Lytle's *unexcused* absences. As a result, the court concluded that the plaintiff had not established a *prima facie* case of race discrimination.[22] Although the standards

[22] At the close of Petitioner's case, the District Judge made the following specific determinations:

> I will find *by plaintiff's own evidence* plaintiff had excess unexcused absence of 9.8 hours, and that, with reference to this unexcused absence, he did not follow the company policy of calling in;
>
> I will find that the conduct on the part of the white employees is not substantially similar in seriousness to the conduct for which plaintiff was discharged.

Based on these findings, the court concluded:

> I will conclude as a matter of law that the Court has jurisdiction of this matter, and that the plaintiff has established that he is a member of a protected category, and that he was discharged for violation of the company's policy, but *I will conclude as a matter of law that he has not established a prima facie case*, since he has not established that Blacks were treated differently, and in fact committed violations of the company's policy of sufficient seriousness;
>
> And I will order that the claim as to the discharge be dismissed.

(App. 28a-29a) (emphasis added).

vary under Rules 41(b) and 50(a), the court's decision did not rest on credibility determinations. Rather, Petitioner's inability to establish a critical element of a *prima facie* case as a matter of law would have guaranteed a directed verdict even if a jury been impaneled. Since Respondent would have received a directed verdict, the denial of a jury is harmless error and remand of the case is unnecessary.

Similarly, a directed verdict would have been proper on Lytle's § 1981 retaliation claims.[23] First, the protection of § 1981 is limited to the right to "make and enforce contracts." 42 U.S.C. § 1981. As such, it's scope is substantially less broad than that of Title VII and does not extend to claims of retaliation, even though this conduct is prohibited by Title VII. *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987), *restored to calendar for reargument*, 108 S. Ct. 1419 (1988). In *Patterson*, the court reasoned that while racial harassment and, by analogy, retaliation, implicates "the terms and conditions of employment" under Title VII, it does *not* abridge the right to "make and enforce contracts." *Patterson*, 805 F.2d at 1145.[24] Similarly, in *Tafoya v. Adams*, 816 F.2d 555 (10th Cir. 1987), the Tenth Circuit held that unlike Title VII, the protections of § 1981 do not encompass a retaliation cause of action. *See also Guy v. City of*

[23] Just as with the discriminatory discharge claim, the elements of an action for retaliation under § 1981, where allowed, are the same as those under Title VII. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984).

[24] Of course, this Court will determine whether § 1981 even applies to private employment when *Patterson* is decided.

Phoenix, 668 F. Supp. 1342, 1350 (D. Ariz. 1987) (§ 1981 limited to discrimination which impacts employment decisions affecting plaintiff).

Even if § 1981 encompasses claims of retaliation, Petitioner failed to estabish a *prima facie* case. In order to establish a *prima facie* case of retaliation, Plaintiff must prove the following three elements by a preponderance of the evidence: (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection between the protected activity and the adverse action. Because Petitioner could only establish the first of the three mandatory elements, his retaliation claim was properly dismissed. *Canino v. EEOC*, 707 F.2d 468 (11th Cir. 1983) (dismissal proper when plaintiff satisfied only two elements of a *prima facie* case).

Petitioner alleged that Schwitzer treated him adversely following the filing of his EEOC charge by providing a neutral letter of reference to prospective employers which contained only his dates of employment and former job title. However, Schwitzer has a well-established company policy of providing such limited references. Respondent presented evidence of many other instances when employees who had not filed EEOC charges received the same limited reference provided for Lytle. It appears that in one case a more detailed reference was supplied, but this incident was found to be a single, unintentional aberration to an otherwise uniform company policy. Accordingly, at the end of all the evidence the district judge held that Lytle's retaliation claim was without foundation as a matter of law and entered judgment for Respondent under Rule 41(b) (App. 29-31). Thus, even if § 1981 prohibits retaliation, Petitioner's failure to establish a *prima facie* case would have warranted a directed verdict. Therefore, the denial of a jury trial was harmless error under Fed. R. Civ. P. 61.

III. SUMMARY REVERSAL IS INAPPROPRIATE IN THIS CASE

As demonstrated above, the Court should not issue a writ of certiorari in this case. The Fourth Circuit's decision is consistent with prior decisions of this Court. Moreover, the alleged conflict with the Seventh Circuit need not be resolved, since Respondent would have received a directed verdict if a jury had been impaneled. Because resolution of the apparent conflict would not change the result below, certiorari should be denied.

If the Court decides to review this case, however, the Petitioner correctly notes that the normal procedure would be to defer judgment of the case pending disposition of the closely-related case already set for argument. Contrary to Petitioner's assertions, this case presents no reason to depart from this practice. In *Patterson v. McLean Credit Union*, No. 87-107, the Court will decide whether § 1981 is applicable to discrimination in private employment. If the Court responds negatively to this question, it will remove the foundation of Petitioner's entire argument. This Petition is premised on the assumption that the district court erroneously dismissed Lytle's § 1981 claims and the concomitant right to a jury trial. By postponing disposition of this case until after the decision in *Patterson*, the Court can obviate the need to address the remaining issues of this appeal. In addition, the Court would save the parties and the Court from an unnecessary appellate argument and potentially another full trial.

Petitioner provides several hypothetical problems which could occur if the Court does not hastily dispose of his petition. A brief examination of these warnings reveals that Petitioner is merely "crying wolf." With respect to his fear that this decision will "wreak havoc on the federal appellate courts,"[25] the court of appeals' decision

[25] Petition at 46.

in this case is an officially "unpublished" opinion. Citations of unpublished opinions are disfavored by the Fourth Circuit.[26] Due to its unpublished status, its exposure to the legal community is quite limited. Even if its reasoning is incorrect, it is unlikely that this opinion will cause any disruption in the federal court system. Petitioner's use of hyperbole is unfounded.

In *Parklane Hosiery*, the Court held that in cases such as this where plaintiff is provided a full and fair opportunity to litigate his claims before a judge sitting in equity, the Seventh Amendment does not compel relitigation of the same issues before a different factfinder. This rationale, followed by the court of appeals below, provides a well-reasoned and eminently fair result. Lytle had a full opportunity to present any and all evidence and his efforts fell short. To allow these same claims to be relitigated would unduly prejudice Respondent and needlessly burden the court system. In *Parklane Hosiery*, the Court refused to read the Seventh Amendment to require such an inequitable result, and this case presents no reason to depart from this principle. If a decision as important as *Parklane Hosiery* is to be reversed or retrenched by the Court, it should not be done without briefing and argument and it should be explained to the lower federal courts in more detail than a one-sentence memorandum opinion allows. *See Harris v. Rivera*, 454 U.S. 337, 349 (1981) (Marshall J., dissenting). Accordingly, should the Court decide to grant this Petition, the parties should be allowed to fully brief and argue the issues presented.

[26] Informal Operating Procedures of the Fourth Circuit 36.4, 36.5.

CONCLUSION

Based on the foregoing reasons, this Petition for a Writ of Certiorari should be denied. Alternatively, should the Petition be granted, Petitioner's request for summary dismissal should be denied and the case should be docketed for briefing and argument following this Court's decision in *Patterson v. McLean Credit Union*, depending on the outcome in that case.

Respectfully submitted,

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